

ISSUES

What is the nature and extent of claimant's injury? More particularly, is claimant entitled to a permanent partial general disability under K.S.A. 44-510e or is claimant essentially and realistically unemployable and, therefore, permanently and totally disabled?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the ALJ should be modified to find that claimant has a 10 percent functional disability, followed by a 39.5 percent permanent partial general disability.

Claimant, an office worker, has worked for respondent since 1989. From that time to the date of accident, claimant was a full-time employee, although it is acknowledged that claimant has missed substantial amounts of work due to prior injuries.

Claimant suffered a back injury originally in 1985 while working for Dorskocil. For that injury, claimant was paid a total of \$75,000 in workers compensation payments, but was able to return to employment.

Claimant has undergone four surgeries, with the first surgery in 1985 after the Dorskocil injury. She underwent a second surgery involving a fusion; a third surgery at which time steel rods were placed in her back; and a fourth surgery in 1996 after a 1994 fall at work which broke the rods in her back and broke claimant's tailbone. The 1996 surgery involved the removal of her tailbone.

On May 20, 2002, while performing filing activities, claimant was on her knees in front of a bookshelf, placing a file on the shelf. After claimant was on her knees for a period of time, she was unable to get up and experienced terrible shooting pains in her back and down into her legs. A co-worker, Linda Bennett, who was sitting near claimant, had to help her get up. That is the last day that claimant actually worked for respondent.

Claimant was referred for treatment to board certified orthopedic surgeon Douglas Charles Burton, M.D. Dr. Burton, who specializes in spinal surgeries, practices at the University of Kansas Medical Center in Kansas City, Kansas. He first examined claimant on May 23, 2002, at which time he reviewed radiographic evaluations, which displayed a solid fusion from L3 to the sacrum with fracture of claimant's spinal rod implants. He noted degenerative spondylosis at L2-3 which he described as being arthritis of the back. He recommended a back brace, a water walking program and conservative care. Dr. Burton next saw claimant on June 20, 2002, at which time claimant had not improved. He recommended a CT scan myelogram, which he reviewed in August of 2002. The CT scan myelogram displayed degenerative arthritis at L2-3 and spinal stenosis at L2-3 as well. On

August 22, 2002, when he next examined claimant, he began discussing the possibility of an additional surgery. That surgery was scheduled for October 2, 2002, ultimately involving a decompression at L2-3 and a fusion at L2-3.

Dr. Burton next examined claimant on November 14, 2002, at which time claimant advised that she was doing okay. However, claimant did have ongoing pain complaints. The back pain continued as of the February 20, 2003 appointment. At that time, he recommended claimant undergo an FCE, which was performed on March 10 and 11, 2003. At Dr. Burton's next examination of claimant on March 23, 2003, he recommended permanent work restrictions, which limited claimant to 15 pounds maximum lift. He considered claimant's disabilities at that time to be permanent.

During the August 21, 2003 examination, claimant advised that she was having ongoing pain in her back and expressed some dissatisfaction with her ongoing symptoms. Dr. Burton rated claimant at a 10 percent whole person impairment pursuant to the *AMA Guides*.¹ In reviewing the FCE, he felt claimant could tolerate sitting from one-third to two-thirds of an 8-hour workday, with the same being true of standing. He also stated that claimant could do a sedentary job, so long as she was not sitting for 8 hours at a time. He testified claimant would benefit by doing a job that at least occasionally would allow her to stand up and move about.

Regarding the form titled Attending Physician's Statement of Disability,² Dr. Burton acknowledged that this form indicates that claimant was permanently and totally disabled from returning to her regular occupation. The form also indicates that claimant is permanently and totally disabled from any occupation, indicating that claimant would never be able to resume any work. However, he testified during his deposition that although claimant was permanently incapable of returning to the job she was performing for respondent at the time of her accident, claimant would be capable of returning to substantial gainful employment so long as she worked within the restrictions placed upon her.

Dr. Burton was provided a task list which had been generated by vocational specialist Jon E. Rosell, Ph.D. After reviewing that task list, Dr. Burton determined that claimant was unable to perform two of the five tasks on the list, for a 40 percent task loss.

Claimant was examined on September 20, 2002, by board certified neurosurgeon Paul S. Stein, M.D., as a referral by claimant's prior attorney, Eric Kuhn. Dr. Stein saw claimant again on May 14, 2003, at which time he recommended no further treatment and

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² Burton Depo., Ex. 5.

felt claimant to be at maximum medical improvement. Dr. Stein rated claimant at 7 percent to the body as a whole pursuant the AMA Guides³ and recommended that claimant work in the sedentary to light work activity range. His work restrictions placed upon claimant were pursuant to the FCE.

In considering the FCE, Dr. Stein felt claimant capable of sitting for a minimum of six hours a day, although he did not believe claimant could sit that long without having the opportunity to change positions, get up and stretch. His recommendation on returning claimant to work was that she be allowed to get up and move around on a regular basis and work a job that involves a variation in activities.

Dr. Stein was also provided a vocational report from Jerry Hardin, a vocational expert. Of the six tasks contained in Mr. Hardin's report, Dr. Stein felt claimant capable of performing all of those tasks, resulting in a task loss of zero percent. There was, however, a timely objection to the task list of Mr. Hardin. That task list was not presented to claimant at any time, nor did Mr. Hardin ever testify in this matter. Claimant argued that a proper foundation had not been laid to allow the report of Mr. Hardin or Dr. Stein's opinion based upon that report to be considered by the Board.

Claimant testified that she was in constant pain, with pain in her low back and radiculopathy down into her legs. The radiculopathy occurs after claimant is standing for awhile. Claimant testified she was only capable standing in one place for approximately two minutes. Claimant stated that after doing dishes, she would have to lie down. Claimant testified that in her opinion she is physically incapable of working as she is unable to work an 8-hour day. Claimant testified that she was only capable of working approximately two hours a day on a regular basis. Since her injury of May 20, 2002, claimant has not applied for any type of employment. She applied for disability benefits under KPERS and was granted those disability benefits. She officially resigned from respondent's employment on February 12, 2003, when she submitted her handwritten resignation.

In proceedings under the Workers Compensation Act, the burden of proof shall be upon the claimant to establish the claimant's right to an award of benefits by proving the various conditions upon which that claimant's right depends by a preponderance of the credible evidence.⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

³ AMA *Guides* (4th ed.).

⁴ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁵

Respondent does not dispute that claimant suffered accidental injury or that she is entitled to a permanent partial general disability under K.S.A. 44-510e. Respondent's argument is that claimant's loss of wages as imputed by the ALJ under K.S.A. 44-510e is insufficient. The ALJ found claimant only capable of working two hours a day at \$6 an hour totaling \$60 per week. The Board acknowledges that working two hours a day at \$6 per hour does not constitute substantial and gainful employment. However, neither health care provider nor any vocational experts have limited claimant to working under 40 hours a week.

K.S.A. 44-510c defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.⁶

A claimant is permanently and totally disabled when he or she is found to be essentially and realistically unemployable.⁷

In this instance, the Board finds persuasive the opinions of Dr. Burton and Dr. Stein that claimant is not permanently totally disabled. Prior to being deposed, Dr. Burton created the Attending Physician's Statement of Disability.⁸ In that document, Dr. Burton indicated claimant was permanently and totally disabled for any occupation and that she was unable to return to any work. However, Dr. Burton explained in his deposition that claimant is totally disabled from performing the job she was performing for respondent at the time she was hurt, but would be able to go back to performing substantial and gainful employment within his restrictions. Based upon the FCE, which claimant underwent in March of 2003, Dr. Burton found claimant capable of returning to work with specific restrictions, including a 15-pound lifting restriction. He also recommended claimant be in a sedentary job which would allow her to change positions on a regular basis.

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

⁶ K.S.A. 44-510c(a)(2).

⁷ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

⁸ Burton Depo., Ex. 5.

Additionally, Dr. Stein found claimant able to return to work at a sedentary occupation pursuant to the FCE. He acknowledged claimant should not sit in a chair for three or four hours at a time in an enforced position, recommending that claimant have the opportunity to get up and move around and change positions periodically.

The Board also considered the testimony of Linda Bennett, but found it provides little support for claimant's position that she is totally disabled.

The Board agrees claimant is substantially limited, but does not find sufficient evidence to support claimant's position that she is totally disabled.

Claimant is capable of returning to work and, in the opinion of vocational expert Karen Crist Terrill, is capable of earning between \$6 and \$10 per hour. Imputing a \$6-an-hour wage, claimant would have a wage loss of 54 percent when compared to her average weekly wage of \$527.21. If the \$10-per-hour wage were utilized, claimant's wage loss would be 24 percent, again comparing it to the stipulated average weekly wage.

The Board finds claimant has the ability to earn \$8 an hour while working a 40-hour week for a post-award wage of \$320 per week. This, when compared to her average weekly wage of \$527.21, results in a wage loss of 39 percent. In averaging claimant's 39 percent wage loss with a 40 percent loss of tasks, claimant is awarded a permanent partial work disability of 39.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated October 22, 2004, should be, and is hereby, modified, and claimant is granted an award for a 10 percent functional disability, followed by a 39.5 percent permanent partial general disability for the injuries suffered on May 20, 2002. Claimant is entitled to 38.14 weeks of temporary total disability compensation at the rate of \$289.88 per week in the sum of \$11,056.02, followed by 4.57 weeks of temporary total disability compensation at the rate of \$351.49 per week in the sum of \$1,606.31, for a total of \$12,662.33, followed thereafter by 152.98 weeks of permanent partial general disability compensation at the rate of \$351.49 per week totaling \$53,770.94, for a total award of \$66,433.27.

As of April 5, 2005, there is due and owing claimant 38.14 weeks of temporary total disability compensation at the rate of \$289.88 per week totaling \$11,056.02, followed by 4.57 weeks of temporary total disability compensation at the rate of \$351.49 per week totaling \$1,606.31, followed thereafter by 107.43 weeks of permanent partial general disability compensation at the rate of \$351.49 per week totaling \$37,760.57, for a total due

and owing of \$50,422.90. That amount is ordered paid in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of \$16,010.37 is to be paid for 45.55 weeks at the rate of \$351.49 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully dissent from the majority determination that claimant suffers a permanent partial disability. We would find claimant has met her burden of proof to establish she is entitled to an award of permanent and total disability as a result of her work-related accidental injury.

Simply stated, claimant has endured five significant back operations, and the final surgery necessitated by her work-related injury has left her essentially and realistically unemployable. After each previous surgery, claimant was able to return to work. But after her last back surgery, claimant now has constant pain and can only stand or sit for a very limited time. Claimant testified that, at best, she could only work two hours a day. The ALJ agreed with claimant's testimony, as he determined claimant only had the ability to work two hours a day when he imputed a wage. Clearly, the limited ability to work two hours a day cannot be said to demonstrate an ability to perform substantial gainful employment.

While Dr. Burton's testimony regarding claimant's ability to engage in substantial gainful employment was equivocal, we would find his original determination that claimant was permanently and totally disabled from any occupation more persuasive, especially when coupled with claimant's testimony regarding her condition. And it should be noted

that Dr. Burton agreed that claimant's ability to work was primarily a matter of her ability to tolerate and withstand her chronic pain. Again, claimant has testified that she can now tolerate her pain only to the extent to work a couple of hours a day.

In *Wardlow*,⁹ the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable, as he was capable of performing only part-time sedentary work. The court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this case, claimant has had five back surgeries. After her last surgery, claimant cannot sit or stand in captive positions for extended periods of time. She has chronic pain and has detailed her inability to maintain a body position without constantly changing positions. She must take pain medication daily. Claimant is credible and her testimony is persuasive. The facts in this case mirror the facts in *Wardlow* that resulted in the finding of permanent total disability.

Accordingly, we would reverse the ALJ's Award and find claimant suffers a permanent and total disability.

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁹ *Wardlow, supra*.